Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) ---------- 2
Section 8(b)(4)(B) ---------- 2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1357

LOCALS 134 AND 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2) is reported at 433 F. 2d 302. The Board's decision and order (Pet. App. 6–28) are reported at 179 NLRB No. 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3) was entered on October 23, 1970, and a petition for rehearing was denied on November 16, 1970 (Pet. App. 4). The petition for a writ of certiorari was filed on February 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the union violated Section 8(b)(4)(B) of the National Labor Relations Act by picketing a construction project of a neutral employer with an object of forcing that employer to cease doing business with the employer with whom the union had its primary dispute.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set out at pp. 3–4 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In March 1967, Winston-Muss Corporation commenced negotiations with the Illinois Bell Telephone Company regarding telephone service to be furnished for Winston Tower No. 3, a condominium apartment house which Winston was constructing in Chicago (Pet. App. 11–12; Tr. 10–11, 73, 119–121).[1] As customary in the area, Winston gave Bell an "easement" for the main cable, and agreed to dig the cable trench and provide interior space, riser shafts, and conduits free of charge; the cable and other telephone equipment remained Bell's property (Pet. App. 12; Tr. 59–60, 64, 71–72, 76–77, 93–95, 106, 121–126). By the spring of 1968, the cable had been placed underground and its service end was coiled in the basement of the

[1] "Tr." refers to the typewritten transcript of testimony before the Board.

partly completed building. (Pet. App. 11, 16; Tr. 12, 80–83, 131).

In May 1968, petitioners ("the Union") struck Illinois Bell over wage demands. They picketed Bell's main business facilities until the strike ended on September 23 (Pet. App. 10; Tr. 103, 131–133). They also picketed at the Tower from August 28 to September 6 (Pet. App. 15).

Between July 1 and August 23, about 150 families moved into the Tower, which was without phone service due to the strike. Numerous occupants complained regarding the lack of service to Winston project manager Speer, claiming "that they had heart trouble" and needed telephones (Pet. App. 11; Tr. 10, 51–52, 55, 74–76).

On Saturday and Sunday, August 24 and 25, when few employees of Winston's subcontractors were working, 12 Bell supervisors worked at the Tower, completing the central phone installation, a job which the strikers would otherwise have done. The supervisors worked 12-hour shifts, uncoiling and splicing the main cable (Pet. App. 11; Tr. 60–61, 80–86, 104–105). On Monday, August 26, the supervisory crew returned again, at 5:30 p.m., when no employees of other employers were present. They completed the cable and conduit work, and installed individual telephones for two doctors, a pharmacist, and three cardiac patients whom Speer regarded as emergency cases. (Pet. App. 12; Tr. 33–34, 86–91, 100–101.) No other Bell work was scheduled at the Winston project, and the Bell crew left no materials other than those they had installed (Tr. 91–92, 102, 108).

At 8:30 a.m. on Tuesday, August 27, Union pickets began to patrol the entrance to the project's driveway [2] with signs stating that the Union was "on strike against Illinois Bell Telephone Company." The pickets stopped trucks servicing project residents and Winston's subcontractors and asked the drivers to respect the picket line (Pet. App. 13; Tr. 13–14, 16–22). At least 12 vehicles, two of which belonged to Winston subcontractors, turned back. Employees of the subcontractors and Winston, who had begun work before the pickets appeared, finished the day (Pet. App. 13; Tr. 16, 19–23, 34–35).

After the picketing started, project manager Speer called Illinois Bell and "made certain" that no Bell work was scheduled for his project (Pet. App. 13–14, 18; Tr. 27, 64, 69–70). He then called Jack Ahern, the Union "strike director," and asked why he had "inherit[ed] the pickets"; Ahern replied that "work was done by the Bell people over the weekend, and that was the reason" (Pet. App. 14; Tr. 24–27). When Speer protested that the six phones were for emergency cases, Ahern stated that his "main complaint" was the permanent cable work the Bell supervisory crew had done. (Pet. App. 14; Tr. 27–28). Speer telephoned Ahern again later, complaining that the pickets were "bottling up the job and putting [him] in a bad condition" and offering to guarantee that no Bell employees would enter Winston property in the future if the picketing ceased. Ahern answered that picket-

[2] The driveway entrance was 600 feet from the construction site itself (Tr. 8–9, 49).

ing would continue "until the permanent installation that the Bell people had installed on the [weekend] was disconnected and removed from the job" (Pet. App. 14; Tr. 28–30). At 6:30 p.m., two hours after the pickets finally left, Speer called Ahern a third time to ask whether the pickets would return. He was told that they would. When Speer offered to reimburse the Union for the work it had lost because of the activity of the supervisory crew, Ahern repeated that "the only way the pickets could be [stopped was] to remove the permanent installation * * * from the job" (Pet. App. 13, 14–15; Tr. 30–32).

The following morning, August 28, the pickets appeared at the project driveway at 7:15—early enough to intercept 95 of the 100 employees scheduled to work that day (Pet. App. 15; Tr. 35–39, 41–42). None of the employees who arrived thereafter crossed the picket line.[3] No Bell employees were on the project while the picketing took place (Pet. App. 15; Tr. 37–40). On August 29, no employees crossed the picket line, and on August 30, only 20 per cent of the employees scheduled to work reported. No Bell employees were present either day (Pet. App. 15; Tr. 39–43).

During the following week, Speer persuaded Ahern to permit installation of telephones in special emer-

[3] The employees turned away included 15 to 20 Winston carpenters and laborers, 35 to 40 employees of Winston's painting subcontractor, 15 or 16 employees of Winston's flooring subcontractor, 12 to 15 employees of Winton's electrical subcontractor, and 5 to 6 employees of Winton's heating subcontractor. Only 5 or 6 employees of Winston's plumbing subcontractor, who had reported before the picket line was set up, continued to work (Pet. App. 15; Tr. 36–37, 42).

gency cases, which were not considered Bell's normal work, if occupants in "desperate" need called Ahern for clearance. When the Union approved such requested installations, it permitted a Bell supervisory crew to complete them (Pet. App. 15–16; Tr. 49, 51–53, 65–66, 90–92, 127, 129). Supervisors installed 25 to 30 phones under this arrangement (Pet. App. 16; Tr. 128).[4] The picketing ended on Friday, September 6 (Pet. App. 15; Tr. 39–40, 44–46).

B. THE DECISIONS BELOW

The Board adopted its Examiner's findings based on the testimony, which was not contradicted.[5] It concluded that, by picketing at Winston's construction site when no Bell employees were present or performing their normal duties there, the Union had demonstrated that its object was to force Winston to cease doing business with Bell, with whom the Union had its primary dispute (Pet. App. 7, 17–19). It therefore ruled that the picketing was secondary, in violation of Section 8(b)(4)(B) of the Act. The Board rejected the Union's contentions that Winston and Bell were not in a business relation with each other, that Winston had lost its neutral status by allying itself with Bell, and that the project was a "primary situs" of Bell (Pet. App. 19–25). The Board ordered

[4] Two phones were also installed in the building manager's office without obtaining clearance from the Union, on the evening of September 4, when no pickets were present. Speer regarded these as special cases, "very important" in case of "fire." (Pet. App. 16, n. 8; Tr. 65, 68, 109, 113.)

[5] The Union called no witnesses (Pet. App. 10, n. 4).

the Union to cease and desist from its unfair labor practices and to post appropriate notices (Pet. App. 7, 27–30). The court of appeals held that the Board's findings and conclusions were supported by substantial evidence, and enforced its order (Pet. App. 1–3).

ARGUMENT

1. Petitioners' contention (Pet. 8, 11–13) that picketing at the Winston project was privileged primary, rather than unlawful secondary, activity rests essentially on the assumption that, so long as Bell's cable remained permanently installed on the project, it was a situs of their primary dispute with Bell. This assumption is erroneous. Under settled principles, the mere presence of the primary employer's property at a site owned by another is not sufficient to make it a primary situs; it is necessary that the site be utilized by the primary employees for the performance of their regular duties. See *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 559; *Local Union No. 519, United Ass'n. of Journeymen* v. *National Labor Relations Board*, 416 F. 2d 1120, 1125–1126 (C.A. D.C.).[6] In this case, as the Board found, none of Bell's employees regularly performed their duties at the Winston project during the period of

[6] *Local 761, Electrical Workers* v. *National Labor Relations Board (General Electric Corp.)*, 366 U.S. 667, and *United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, are consistent with this analysis. The activity in those cases occurred at or immediately adjacent to facilities owned by the primary employer, at which his employees regularly performed their normal duties.

the picketing and the Union had no reason to believe that they would (Pet. App. 2, 18, 24–25). In these circumstances, the Board properly concluded that the Union's picketing there was secondary, and not primary.

2. There is similarly no merit to petitioners' argument (Pet. 9, 12–16) that they could not have forced Winston to "cease doing business" with Bell because Bell was a monopoly. "The phrase, 'doing business,' would ordinarily cover doing any business which the third party is free to discontinue * * *." *International Brotherhood of Electrical Workers* v. *National Labor Relations Board* (*Langer*), 181 F. 2d 34, 37 (C.A. 2), affirmed, 341 U.S. 694. As the Board found, the fact that neither Winston nor Bell "paid the other for materials and services * * * does not mean that they were not 'doing business' with one another," for the "mutual benefits they derived furnished adequate consideration for their arrangement" (Pet. App. 21). Availability of "telephone service to prospective tenants was an important factor in renting or selling [Winston's] apartments" (*ibid.*); similarly, Bell desired to sell its telephone service to the condominium owners. Accordingly, Winston and Bell engaged in frequent consultations and dealings, exchanging materials and services for mutual benefit. The Union's effort to disrupt this business relationship is sufficient to satisfy the "cease doing business" requirement of Section 8(b)(4)(B). Cf. *National Labor Relations Board* v. *Local 825, International Union of Operating Engineers* (*Burns and Roe*), Nos. 40 and 42, 1970 Term, decided January 12, 1971.

3. Similarly, petitioners' contention (Pet. 9–10, 16–18) that Winston was Bell's ally because the two companies cooperated in adjusting architectural plans and work schedules for their mutual convenience and because Winston permitted the Bell supervisory crew to work in its building despite the strike presents no issue warranting further review. The Board found that the two companies are not commonly owned or controlled, and that Winston did not attempt to perform work which, but for the strike, would have been performed by Bell's employees. In these circumstances, under settled authority, the "fact that Winston may have 'cooperated' with Bell in providing telephone service to the tenants" did not change Winton's neutral status to make it an ally of Bell. (Pet. App. 23.)

4. Finally, there is no substance to petitioners' claim that Bell's failure to produce subpoenaed work orders at the hearing before the Examiner denied them due process (Pet. 10, 18–21). The Board found, and the court of appeals agreed, that Bell offered a reasonable explanation why it did not keep records showing the total number of installations made during the strike (Pet. App. 2, 16 n. 8). The information was, in any event, irrelevant. The Union was "indifferent and unconcerned about Bell's work schedule," made no attempt during the picketing to ascertain if Bell employees were working at Winston, and was only interested in getting the completed Bell cable work removed (Pet. App. 25.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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